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IN THE

Supreme Court of the United States

OF AMERICA

October Term, 1941.

No. 81.

JULIAN RILEY and HUGHES SPALDING, as Executors of the ESTATE OF JULIA M. HUNGERFORD, Deceased,

Petitioners,

vs.

THE NEW YORK TRUST COMPANY, as Administrator *C. T. A.* of the ESTATE OF JULIA M. HUNGERFORD, Deceased,

Respondent.

BRIEF ON BEHALF OF THE STATE TAX COMMISSION OF NEW YORK AS AMICI CURIAE.

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BRIEF ON BEHALF OF THE STATE TAX COMMISSION OF NEW YORK AS AMICI CURIAE.

This case presents the question of whether a decree in one state admitting a will to probate must be accepted as conclusive on decedent's domicile, under the "full faith and credit" clause, by the courts of the state of incorporation of a corporation, stock in which was owned by the decedent, where an administrator

c. t. a. of a third state claims such stock on the ground that the decedent was domiciled therein.

This brief is submitted on behalf of the State Tax Commission of New York because it is interested generally in the administration of the assets of estates in so far as it may affect the collection of state death taxes and specifically because it seeks to collect any estate taxes that may be due it from the estate of Julia M. Hungerford, decedent herein.

The specific interest of the State Tax Commission appears from the following facts. Julia M. Hungerford, decedent herein, died on November 28, 1935 (R. 8). On January 22, 1936 a temporary administrator was appointed by the Surrogates' Court of New York County, New York on the petition of O. Robert Hungerford, decedent's husband (R. 63-73). On June 12, 1936, the State Tax Commission of New York commenced a proceeding for the probate of the decedent's will by filing a petition in said Surrogates' Court (R. 76-84). Said proceedings were stayed by reason of an injunction order against the Commission in an action for interpleader under the Federal Interpleader Act instituted in the District Court of the United States for the Southern District of Georgia. After such injunction had been dissolved because of the decision of this Court in *Worcester County Trust Co. v. Riley*, 302 U. S. 292, said Surrogates' Court made an order on February 14, 1938 in which it consolidated said proceeding of the State Tax Commission with a proceeding which had been commenced by the decedent's husband in October 1937 also for the probate of decedent's will (R. 124-129). Said Surrogates' Court made a de-

cree on the same day admitting decedent's will to probate and continuing the above mentioned temporary administrator. The decree admitting the will to probate contained a finding that the decedent was domiciled in New York at the time of her death (R. 127). On April 26, 1938, said Surrogates' Court, upon the petition of the State Tax Commission and the decedent's husband, appointed the New York Trust Company as administrator *c. t. a.* (R. 131-2).

ARGUMENT.

A state having assets in its jurisdiction is not compelled to give full faith and credit to a probate decree of another state on the question of decedent's domicile.

The question presented in this proceeding, as *amici curiae* view it, is whether the decree of the Georgia court admitting the decedent's will to probate as a resident of that state, must be accorded full faith and credit by the courts of Delaware with respect to the question of where the decedent was domiciled at the time of her death.

Amici curiae submit that to compel the Delaware courts to accept the Georgia decree as determinative of decedent's domicile would be contrary to reason and authority.

Viewed as an *in rem* judgment a decree admitting a will to probate affects only property within the state.

Thormann v. Frame, 176 U. S. 350;
Overby v. Gordon, 177 U. S. 214;
Baker v. Baker, Eccles & Co., 242 U. S. 394.

In *Baker v. Baker, Eccles & Co., supra,* full faith and credit was claimed in Kentucky for a Tennessee judgment of administration. In denying the claim this Court said (pp. 400-1):

> "We have no concern with the effect of the Tennessee judgments upon the distribution of so much of decedent's personalty as was situate within that State. The present action affects only the ownership of shares of stock in a Kentucky corporation having no *situs* outside of its own State, so far as appears, and a claim of indebtedness against the same corporation. * * * No State need allow property of a decedent to be taken without its borders until debts due to its own citizens have been satisfied; and there is nothing in the Constitution of the United States aside from the full faith and credit clause to prevent a State from giving a like protection to its own citizens or residents who are interested in the surplus after payments of debts. All of which goes to show, what plaintiff in error in effect acknowledged when she brought her present action in a Kentucky court, that the Tennessee judgments had no effect *in rem* upon the Kentucky assets now in controversy. * * *"

Additional reasons support the view that the full faith and credit clause should not be invoked to give extra-territorial force to a decree admitting a will to probate.

The question of domicile in a probate proceeding is one that is ordinarily decided *pro forma* by the court. A petition is presented which alleges that the dece-

dent was a resident of the state. Upon such petition, after usually perfunctory proof by subscribing witnesses, a will is admitted to probate. In the vast majority of cases the proceeding is unopposed and the question of domicile rarely litigated. In a similar connection Mr. Justice Holmes in *Brigham v. Fayerweather*, 140 Mass. 411, in considering whether a probate decree was even evidence of the mental capacity of a decedent said (page 414):

> "For except in the comparatively small number of cases where the probate of the will is opposed, the investigation of the fact is necessarily only formal."

The fact that all of the states of the Union (except Nevada) have death taxes and that the rates of many states vary, gives additional support to the hitherto accepted rule in this Court. To accord full faith and credit to a decree in one state admitting a will to probate in the courts of other states wherein assets are located would encourage evasion of state death taxes. The heirs and distributees of an estate by submitting themselves to the jurisdiction of a probate court of a state with lower death tax rates could obtain a decree which would be entitled to full faith and credit in all other states. A state which was the true domicile of the decedent, but which had no assets or from which assets had been removed, would be unable to enforce its taxes in a third state because it would be met conclusively by a probate decree that must be given full faith and credit.

If a probate decree be entitled to full faith and credit in a state which does not claim decedent's domi-

cile but where assets are located, then *amici curiae* are unable to see why it is not entitled to full faith and credit in any proceeding, including a tax proceeding, in a state claiming domicile. Yet it has been consistently held that the courts of two or more states may each decide that a decedent was domiciled therein for purposes of state death taxes and that a decree of one state adjudging a decedent to be domiciled therein for purposes of taxation is not entitled to full faith and credit in another state.

Tilt v. Kelsey, 207 U. S. 43;
Worcester County Trust Co. v. Riley, 302 U. S. 292;
Texas v. Florida, 306 U. S. 398.

While the State Tax Commission of New York recognizes the inequity of double domicile in death taxation, as graphically illustrated by the *Dorrance* cases (309 Pa. 151, cert. denied, 287 U. S. 660; 287 U. S. 580; 116 N. J. L. 362, cert. denied 298 U. S. 678), and in fact has taken the lead in attempting a solution among the states so that an estate may not be subjected to more than one domiciliary death tax,* it is of the opinion that a decision in the case at bar that a decree of a probate court of one state must be accorded full faith and credit in other states, would not aid in solving the problem, but instead would encourage the evasion of state death taxes.

Finally, a probate decree should not be given full faith and credit on the question of domicile because to do so would lead to absurd results. Since two states

*"A Practical Solution of the Double Domicile Problem"—"The Trust Bulletin" published by American Bankers Association—Vol. 20, No. 10—June, 1941.

may each admit a decedent's will to probate upon the theory that he was domiciled in each state at the time of his death (*Thormann v. Frame, supra,* 176 U. S. 350; *Overby v. Gordon, supra,* 177 U. S. 214; *Baker v. Baker, Eccles & Co., supra,* 242 U. S. 394), a third state may be confronted with conflicting decrees each of which would be entitled to full faith and credit. Hence, it is inevitable that neither decree can be conclusive, but that the third state must have power to determine for itself the question of domicile and the disposition of assets within its jurisdiction.

The Georgia decree is not binding on the New York administrator.

The Georgia decree is not entitled to full faith and credit because (a) the New York administrator was not a party to the Georgia proceeding and (b) he was not in privity with any party to that proceeding.

Viewed as an *in personam* judgment, the Georgia decree only binds the parties to that proceeding, and since the New York administrator was not a party, he is not bound by the Georgia decree (*Sunshine Anthracite Coal Co. v. Adkins,* 310 U. S. 381, 402; *Hansberry v. Lee,* 311 U. S. 32). The rule is succinctly stated in American Law Institute's Restatement of Conflict of Laws, Section 470, as follows:

"* * *

"(3) A judgment in administration proceedings in any state is conclusive upon all persons who became subject to the jurisdiction of the court in such proceedings.

"(4) If an issue as to the state in which a decedent was domiciled at the time of his death is

raised by a person not precluded from raising this issue under Subsection (3), a court will not regard itself as concluded by a prior finding made in another state as to the place of the decedent's domicile."

Petitioners apparently contend that although the New York administrator was not a party to the Georgia proceeding, he is in privity with the decedent's husband who was a party to such proceeding and that said administrator is therefore bound by the Georgia decree.

It is clear that the New York administrator is not in privity with decedent's husband. Privity means mutual succession or relationship to the same rights of property (Greenleaf on Evidence, (Lewis's Edition) Section 523; *Stacy v. Thrasher*, 6 How. 44, 58; *Litchfield v. Goodnow*, 123 U. S. 549; *Bigelow v. Old Dominion C. Min. & Sm. Co.*, 225 U. S. 111, 128). The New York administrator is not identified in interest with decedent's husband. The former does not claim through the latter, the latter does not claim the same property rights as the former. The interests represented by both are entirely different. The decedent's husband represents himself. The administrator is an officer of the court. He represents the creditors and legatees (*Blood v. Kane*, 130 N. Y. 514).

The fact that decedent's husband, in addition to the State Tax Commission of New York, petitioned for the appointment of the administrator in New York is immaterial. Even if the New York administrator had been appointed on the sole petition of decedent's husband, or if he had been appointed administrator him-

self, the New York administrator would not be bound by the Georgia decree.

Troxell v. Del. Lack. & West. R. R., 227 U. S. 434;
Ingersoll v. Coram, 211 U. S. 335;
Brown v. Fletcher's Estate, 210 U. S. 82;
First National Bank v. Shuler, 153 N. Y. 163;
McCarthy v. Wood Lumber Co., 219 Mass. 566;
Buck v. Hunter, 98 Vt. 163.

Petitioners' reliance on *Chicago, Rock Island & Pacific Railway Co. v. Schendel*, 270 U. S. 611, is misplaced. There the court found an identity of interests between the plaintiff in both cases and hence an estoppel by reason of the full faith and credit clause. In that case this Court said at page 620:

> "Indentity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different, Bigelow on Estoppel, 6th. ed. 145; and parties nominally different may be, in legal effect, the same."

The New York administrator is in form and substance wholly different from the decedent's husband and the fact that the latter appeared in the Georgia proceeding does not bind the former.

Petitioners contend that since all parties interested in succession were before the Georgia court, the decree of that court is binding. Petitioners confuse administration and succession.

The litigation in Delaware relates to the administration of decedent's personal estate, not to its succession. Nowhere in the comprehensive decree of the Delaware Supreme Court is any mention made of the distribution of the property which was the subject

matter of the action. The court merely found that the New York administrator represented the domiciliary administration and directed the delivery of the stock to it. As the Court pointed out in its opinion, there is nothing which precludes the Georgia executors from contending that Mr. Hungerford, having litigated the issue of domicile in Georgia, is personally bound by the decree there rendered. But while the courts, either of New York or Georgia or both, may be obliged to hold that Mr. Hungerford's distributive share must be determined by the law of Georgia because he personally is bound by the Georgia decree, that does not determine the place of administration.

The difference between administration and distribution is shown in *Schouler on Wills, Executors and Administrators* (Sixth Edition) Vol. 3. It is said (pp. 1672-3):

> "The main objects proposed are these: that the personalty of the deceased be properly collected, preserved, and (together with income and profits) duly accounted for; that his just debts and the charges consequent upon his death and the administration of his estate be paid and adjusted, * * * that the distribution and division of the residue or surplus of the estate be made among such persons and in such proportions as the will of the deceased, if there be one, otherwise the statute of distributions, may have prescribed. *The primary purpose of administration is to collect the assets and to pay debts, and distribution is only an incident.*" (Italics supplied.)

The fact that all persons interested in succession were before the Georgia court is immaterial since different persons are interested in administration.

At page 17 of their brief petitioners assert that "neither the State of New York nor anyone else claiming as a creditor is affected by the finding of a domicile in the Georgia proceeding." While it may be that neither the State of New York nor the New York creditors are affected by the Georgia finding, yet they are seriously affected if such finding is deemed conclusive in Delaware. If the Georgia decree must be accorded full faith and credit and the assets of the estate are transmitted to Georgia for administration, it is doubtful that the State of New York, even though upon petitioners' concession it might assess its death taxes, could enforce their collection in the Georgia courts in view of the statute of that state permitting the collection of taxes of other states on a reciprocal basis (Ga. Laws, Extra Session 1937-8, p. 102), and in view of *Colorado v. Harbeck*, 232 N. Y. 71. While *Massachusetts v. Missouri*, 308 U. S. 1, may remove any constitutional objection to a suit by New York in Georgia, the courts of that state, under the above mentioned statute, are apparently closed to New York. If the Georgia decree is accorded full faith and credit and the assets transmitted to Georgia, the New York creditors are obviously affected since they would be compelled to assert their claims in Georgia.

All of which is respectfully submitted,

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